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Notes

Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan

CARL SHADI PAGANELLI*

NATURALI vero iure communia sunt omnium hac: aqua profluens, aer et mare et litora maris, quasi mari accessoria. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et ædificiis abstineat, quia litora non sunt iure gentium communia sicut et mare. Immo ædificia, si in mari sive in litore posita fuerint, ædificantium sunt de iure gentium.

—Bracton

INTRODUCTION

In its recent decision in Glass v. Goeckel, the Michigan Supreme Court opened to the public almost two thousand miles of formerly private land along the shores of Lake Michigan and Lake Huron. The

* J.D. Candidate, University of California, Hastings College of the Law; M.A., Columbia University; B.A., University of California, Berkeley. The author wishes to thank Professor Brian Gray and the editors and staff of the Hastings Law Journal for their contributions to this Note. All errors, infelicities, and shortcomings are, of course, the author’s alone.

1. HENRY DE BRACTON, DE LEGIBUS ET CONSuetudinis ANGLiae, II. 39-40 (George Woodbine ed., Yale Univ. Press, 1942) (1569), available at http://hlsl5.law.harvard.edu/bracton/Unframed/Latin/v2/t9.htm, translated in BRACtON: ON THE LAWS AND CUSTOMS OF ENGLAND (Samuel E. Thorne trans., 1977) (“By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore, provided he keeps away from houses and buildings [built there], for by the jus gentium shores are not common to all in the sense that the sea is, but buildings built there, whether in the sea or on the shore, belong by the jus gentium to those who build them.”). Bracton (also known as Henry de Bracton) was a medieval English jurist who lived circa 1210-1268. Harvard Law School Library, Bracton Online, http://hlsl5.law.harvard.edu/bracton/Common/index.htm (last visited Apr. 1, 2007). In Roman law the jus gentium (or jus inter gentes) was “[t]he body of law, taken to be common to all civilized peoples.” BLACK’S LAW DICTIONARY 877 (8th ed. 2004).

2. 703 N.W.2d 58 (Mich. 2005), cert. denied, 126 S. Ct. 1340 (2006); Dave Eggert, Michigan Supreme Court Considers Beach Rights, DETNEWS.COM, Mar. 10, 2005, http://www.detnews.com/2005/metro/050310/007-112832.htm. The case was the subject of national judicial and media attention. See, e.g., Eggert, supra. Before it was argued in Michigan, representatives from the Michigan legislature,
court based its decision on the public trust doctrine, under which "the state, as sovereign, has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public." The Michigan Supreme Court's use of the public trust doctrine is but another example of the long-standing common-law tradition of "creative judicial misunderstanding" of Roman law. The court legitimized its application of the public trust on the doctrine's supposed Roman law underpinnings. Part I of this note briefly traces the origins of the public trust doctrine in the common law. Part II argues that Glass worked a change in Michigan common law, contrary to the reasonable expectations of property owners. Part III explains how judicial action like that in Glass effects a taking of private property for public use without just compensation. While the misunderstandings underlying the historical origins of public trust doctrine do not justify abandoning it, uncritical application of the doctrine can lead to unconstitutional effects.

I. THE ORIGINS OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine has long been recognized as a means of expanding the public's rights over what would otherwise be private land on the foreshore of navigable bodies of water. That the public trust doctrine reflects a misunderstanding of Roman law is not a new idea: Patrick Deveney advanced it in the 1970s, perhaps to counter the growing influence and use of the doctrine at the time. The United States Supreme Court adopted the public trust doctrine according to the English common law of the sea, but has enhanced and expanded its reach

3. Glass, 703 N.W.2d at 64.
4. Patrick Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 SEA GRANT L.J. 13, 39 (1976). Deveney uses this phrase in a different context, but it is an apt description of the transformation of the meaning of the term "jus publicum" as it relates to the public trust doctrine.
5. See Deveney, supra note 4, at 36-66. The two principal cases establishing the public trust doctrine in the United States are Arnold v. Mundy, 6 N.J.L. 1, 53 (N.J. 1821) (holding that the public trust concept applied to the grants of land Charles II made to his brother James in what would become New York and New Jersey) and Illinois Central Railroad v. Illinois, 146 U.S. 387, 463-64 (1892) (holding that a state could not grant or surrender control of that which it holds in trust for the people of that state, namely the state's navigable waters and the lands below them).
over the years. Since Michigan has long held that "the common law of the seas applies to the Great Lakes," it too applies the public trust doctrine to the shores of the Great Lakes. "The state serves, in effect, as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure." The Michigan court is not alone in giving credence to the Roman origins of the public trust doctrine. Professor Sax has argued that:

Long ago, there developed in the law of Roman Empire a legal theory known as the "doctrine of the public trust." It was founded upon the very sensible idea that certain common property, such as rivers, the seashore, and the air were held by the government in trusteeship for the free and unimpeded use of the general public. Michigan traces its sovereignty over the Great Lakes back to the Northwest Territories, which were ceded to the United States by Virginia in 1784, and from Virginia back to the English Crown. The United States Supreme Court held that: "[W]hen the Revolution took place, the people of each state became themselves sovereign; and in that character, [held] the absolute right to all their navigable waters, and the soil under them for their own common use," and that "absolute right" was the same as the King of England's. In discussing the public trust doctrine, the Court explained that under the common law of the sea,

both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. . . . [T]he title, *jus privatum*, in such lands . . . belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

The august antecedents of the public trust doctrine are said to be the Roman law principles *jus privatum* and *jus publicum*, which American courts have used to define and limit private and public rights in real property. The Michigan Supreme Court's explanation of these concepts

10. Glass, 703 N.W.2d at 64–65.
12. Glass, 703 N.W.2d at 87.
15. E.g., Glass, 703 N.W.2d at 65. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc, 879 A.2d 112, 120 (N.J. 2005), which was decided on July 26, 2005, also turned to what it referred to as
is typical: "Jus publicum refers to public rights in navigable waters and
the land covered by those waters; jus privatum, in contrast, refers to
private property rights held subject to the public trust." The court cites
Black’s Law Dictionary as support.

It is worth noting two points at the outset. First, the difference
between jus publicum and jus privatum was probably of no import to
Roman lawyers. Moreover, the only surviving Roman definition of jus
publicum has nothing to do with public ownership of land or resources.
The terms jus privatum and jus publicum appear together in only two
surviving texts, neither of which have anything to do with or shed any
light on the public trust doctrine. Second, Roman law never developed
the equitable concept of trusts. How, then, did these principles,
supposedly based on Roman law, come to be applied to a beach in rural
Alcona County, Michigan?

A. THE RECEPTION OF ROMAN LAW INTO THE COMMON LAW

Abundant traces of Roman law survive today in modern Western
legal culture, even in common law countries. The main source of
modern knowledge of later Roman law is the Corpus Juris Civilis,
commissioned by the Eastern Roman Emperor Justinian in the sixth
century A.D. as a summary of the then extant Roman law. After the fall
of the western Roman Empire, Roman law fell into desuetude until the

"Roman law" to justify its expansion of the zone of public trust on New Jersey
beaches. See also Fabrikant v. Currituck County, 621 S.E.2d 19, 27-28 (N.C. Ct. App. 2005) (discussing public trust
doctrine but denying relief to plaintiff seaside landowners who sought to quiet title in themselves to
dry sand portion of beach).

16. Glass, 703 N.W.2d at 65.

17. Id. Note, however, that the dictionary does not include the qualification that the jus privatum is
"subject to the public trust." Black’s Law Dictionary, supra note 1, at 879. Black’s defines jus
publicum as “[t]he right, title, or dominion of public ownership; esp., the government’s right to own
real property in trust for the public benefit,” and jus privatum is “[t]he right, title, or dominion of
private ownership." Id. at 878-79.


Civilian Tradition and Scots Law, Aberdeen Quincentenary Essays 88-89 (D.L. Carey Miller &
Reinhard Zimmerman eds., 1997). The definition is Ulpian’s, and indicates that public law comprises
three elements: religion, priesthood, and magistracies. Id.

20. Id. at 89 n.7.

(1885).

22. First-year American law students learn a host of such Latin phrases as pacta sunt servanda, sic
utere tuo ut alienum non laedas, and res judicata. The most recent edition of Black’s Law Dictionary
contains a sixty-two page appendix of legal maxims in Latin. Black’s Law Dictionary, supra note 1,
at 1703-65.

(1973).
rediscovery in Italy of the *Corpus Juris Civilis* around 1000 A.D. After its rediscovery, scholars at the University of Bologna (the “glossators”) began commenting on *Corpus Juris Civilis* in an effort to understand its meaning. Later scholars organized its precepts and applied them to legal problems of the day. By 1400, about fifty universities in Europe, including Oxford and Cambridge, taught Roman law (not local or territorial law). Lawyers and scholars mined Roman law as a source of building blocks for a new European legal culture. In a syncretic process, Roman law and the canon law (*Corpus Juris Canonici*) were combined to form the jus commune, or the common legal culture of Europe from the Middle Ages to the age of codification at the end of the eighteenth century. The widespread influence of Roman law by the sixteenth century stems from several factors: it arrived as a prestigious source of law before nation-states could decisively impose their own local laws, European legal culture occurred primarily in one language (Latin), and Roman law provided better ways of regulating an advancing society and commerce than local or customary law did. That this source was in the one common language shared by scholars throughout Europe aided its diffusion. Large numbers of law students traveled to foreign universities, where they learned Roman and Canon law, not local or customary law. When faced with a difficult or novel question, the lawyer in the jus commune era would first apply local law, and if that did not provide him an answer, he would turn to scholarly treaties on Roman law to find one. Roman law was thus “a kind of treasure-house where everybody could enter and find what he needed to solve a legal problem.”

Roman law survives in various forms in the modern era, as in the Roman-Dutch legal system, Scotland, and Louisiana. It is the
foundation of many modern civil law regimes; the Code Napoléon was based in part on it; and civil lawyers see themselves in a sense as heirs to the Roman law tradition and spend many hours studying Roman law.\textsuperscript{36} Latin is still used today, both symbolically (for example, on inscriptions on judicial buildings and seals) and to communicate legal concepts.\textsuperscript{37} Roman law, though not directly followed, still serves as a source of legitimacy and understanding in modern civil law countries.\textsuperscript{38}

Though we are not heirs to the civil law, Roman law has long served as a legitimizing force in the common law. The example of Bracton shows that there were English jurists of the twelfth and thirteenth centuries who had a broad understanding of Roman law.\textsuperscript{39} De Legibus et Consuetudinibus Angliae, the influential treatise on the laws and customs of England attributed to Bracton, relied on Roman law for the proposition that the sea and seashore were common to all, although this normative view may have been more wishful thinking on Bracton's part than a reflection of the state of English law at the time.\textsuperscript{40} Moreover, until the end of the eighteenth century, some English courts, including the High Court of Admiralty, followed the jus commune as substantive law.\textsuperscript{41} The equity courts, whose early chancellors were clerics, relied on Romano-canonistic procedural and substantive law.\textsuperscript{42} Blackstone, too, relied heavily on civil-law authorities. Though the public trust doctrines of England and the United States have diverged, they both share a perceived basis in Roman law, as explained below.\textsuperscript{43} "Justice Storey relied on the codified reasoning of Justinian and the Code Napoleon in [his] seminal contributions to the development of an American law of waters."\textsuperscript{44} Roman law continues to provide a purported theoretical foundation for modern legal doctrine,\textsuperscript{45} as the decision in Glass indicates.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{36} Coing, \textit{supra} note 23, at 515.
\item \textsuperscript{37} Heikki E.S. Mattila, \textit{Jurilinguistique et Latin Juridique}, in \textit{Jurilinguistique: entre langues et droit} 71, 79 (Jean-Claude Gémar & Nicholas Kasirer eds., 2005) ("Malgré l'abandon du latin en tant que langue vivante des jurists, on utilise cette langue pour exprimer des concepts et des principes juridiques avec exactitude." ["In spite of the abandonment of Latin as a living language of the jurists, we still use this language to express legal concepts and principles with exactitude."]).
\item \textsuperscript{38} Coing, \textit{supra} note 23, at 515.
\item \textsuperscript{39} Id. For more information about Bracton, see \textit{supra} note 1 and sources cited therein.
\item \textsuperscript{40} Deveney, \textit{supra} note 4, at 36–38.
\item \textsuperscript{41} Coing, \textit{supra} note 23, at 515.
\item \textsuperscript{43} See \textit{infra} Part I.B.
\item \textsuperscript{44} Deveney, \textit{supra} note 4, at 18–19.
\item \textsuperscript{45} See Barry Nicholas, \textit{Rules and Terms—Civil Law and Common Law}, 48 \textit{TUL. L. REV.} 946, 946 (1974) (noting that common law lawyers have frequently looked to Roman law in developing contract law doctrine).
\item \textsuperscript{46} Glass, 703 N.W.2d at 64 (quoting J.A.C. Thomas, \textit{The Institutes of Justinian}, Text, Translation and Commentary (1975) (translating J. INST. 2.1.1)).
\end{itemize}
B. THE PUBLIC TRUST DOCTRINE ENTERS THE COMMON LAW

The typical common-law justification for the public trust doctrine is an oft-misunderstood passage from Justinian's Institutes. The Glass Court quotes it as follows: "Now the things which are, by natural law, common to all are these: the air, running water, the sea, and therefore the seashores. Thus, no one is barred access to the seashore..." The United States Supreme Court has followed suit: "[The sea and seashore] are incapable of ordinary and private occupation, cultivation and improvement; their natural and primary uses are public in their nature." A few words of explanation about this famous passage are in order here. Deveney notes that "the category of 'things common to all' has proved to be a great problem to scholars of the Roman law." Things "common to all" were not at all "public" in the sense that we use that term. The sea and the seashore were 'common to all' only Insofar as they were not yet appropriated to the use of anyone or allocated by the state." Once a person appropriated common things to his own needs, for example, by building a villa on the seashore, that act "made [the] area... private, and gave the holder real ownership... which was presumably heritable and assignable." The sea and the seashore were not governed by private law (jus privatum). Since they were the property of the Roman people, they were:

[C]apable of being granted by the state to the complete exclusion of the rights of the public in general. There were no restraints whatever imposed by law on the power of the sovereign to convey public lands, including the sea and the seashore. Exclusive grants of the coastal area resources were frequently made.

Thus, the rights of the public to the seashore were extinguishable in Rome, which is contrary to the typical assertion of the inalienability of the public trust (jus publicum) in American common law. Compare the Glass court's formulation: "The state, as sovereign, cannot relinquish [its] duty to preserve public rights in the Great Lakes and their natural resources." Moreover,

[p]ublic rights in certain types of access to the waters and lands beneath them remain under the protection of the state [of Michigan]. Under the public trust doctrine, the sovereign never had the power to

47. Id.
49. Deveney, supra note 4, at 26.
50. Id. at 26–33.
51. Id. at 29 (emphasis added).
52. Id. at 30.
53. Id. at 31.
54. Id. at 31–33 (emphasis added).
56. Id.
eliminate those rights, so any subsequent conveyances of littoral property remain subject to those public rights.57

The change in understanding of the public’s right to the sea and shore occurred at the outset of the arrival of the Roman law doctrine into the common law.

Bracton introduced “almost verbatim” the Roman law of the sea into English jurisprudence.58 Under the jus publicum as it developed in the common law, the Crown could not alienate or destroy the public’s right in navigable waters.59 The Magna Carta supplies the earliest autochthonous English source of the public’s rights to coastal lands.60 The common law continued to develop the laws governing coastal resources over the centuries; great changes occurred in the period between 1600 and 1800.61 English and American courts generally accepted the idea that “title to the foreshore and lands under water was prima facie in the Crown and had not been conveyed when littoral lands were conveyed.”62 Lord Chief Justice Hale “defined the jus publicum—the right of the public in navigable waters—and declared it beyond the power of the crown to abrogate.”63 Hale’s 1667 treatise, De Jure Maris et Brachiorum Ejusdem,64 has had a profound influence on American law.65 In it, Hale lays out “the vocabulary and conceptual set for future discussion of the law of the coastal area.”66 The jus privatum he defined as the private title to coastal land.67 The jus regium or the royal right, was akin to the police power and as such could not be conveyed to a subject.68 The king’s role was “vindex et defensor jurium publicorum.”69 The jus publicum for Hale was “solely an interest in navigation and a public right to have navigable rivers and the ports of the kingdom free of nuisances.”70 Deveney notes that “[t]here is no suggestion whatsoever of a public trust in Lord Hale’s

57. Id. at 66.
58. Deveney, supra note 4, at 17.
59. Id. at 36. This survives in the United States as the federal navigational servitude, which “preserves for the federal government control of all navigable waters ‘for the purpose of regulating and improving navigation . . . .’” Glass, 703 N.W.2d at 64-65 (quoting Gibson v. United States, 166 U.S. 269, 271-72 (1897)).
60. Deveney, supra note 4, at 39-41. Deveney notes wryly that “American courts have obtained extraordinary mileage from the prohibitions of Magna Carta.” Id. at 40-41.
61. Id. at 41.
62. Id.
63. Id.
65. Deveney, supra note 4, at 44-45.
66. Id. at 45.
67. Id.
68. Id.
69. I.e., the vindicator and defender of public rights. SIR MATTHEW HALE, FIRST TREATISE (1768), reprinted in Moore, supra note 64, at 55.
70. Deveney, supra note 4, at 44-45.
writings, and he recognized no limitations on the power of the Crown to convey title to the coastal area.” After the Restoration, English kings continued to make extensive grants of Crown lands under water.

Hale’s definition of the jus publicum was transformed when it entered American jurisprudence and became “a species of quasi-property which the state must maintain to preserve navigation,” rather than what it had been in England, “an open-ended set of uses over navigable waters protected by the police power of the state.” In 1842, Martin v. Waddell’s Lessee further confused Hale’s categories by seeming to indicate that the jus publicum might be “passed” by the sovereign to a private landowner. It was not until fifty years later, in Illinois Central Railroad v. Illinois, that the Court clarified that what a state could not transfer is its sovereignty: “[T]he power exercised by the State over the lands and waters is . . . the jus regium, the right of regulating, improving and securing them for the benefit of every individual citizen.” Both the majority and the dissent in Glass cited Illinois Central as defining “the scope of the public trust doctrine as applied to the submerged lands of the Great Lakes.”

II. THE GLASS DECISION

A. KEEP OFF MY BEACH, LADY

In Glass, the Michigan Supreme Court applied the public trust doctrine to a dispute between neighbors, and in so doing, arguably changed Michigan property law regarding the rights of littoral landowners. In 1997, Richard and Kathleen Goeckel bought land on the shore of Lake Huron. Joan Glass, a widow, has owned a cottage across the highway from the Goeckels since 1967. The previous owner of the Goeckels’ property deeded Glass a fifteen-foot-wide easement across the

71. Id. at 48.
72. See Moore, supra note 64, at 414–26.
73. Deveney, supra note 4, at 53–54.
74. Martin v. Lessee of Waddell, 41 U.S. 367 (1842).
75. Deveney, supra note 4, at 56–59.
76. 140 U.S. 387, 456 (1892).
77. Glass v. Goeckel, 703 N.W.2d 58, 87–88 (Mich. 2005) (Markman, J., dissenting); see also id. at 61 (majority opinion). The dissent emphasized that “[b]ecause the state’s public-trust title is a function of its sovereignty, the lands covered by the doctrine cannot be alienated, except when such alienation promotes the public use of them and the public use of the lands and waters remaining is not harmed.” Id. at 88 (Markman, J., dissenting).
78. Id. at 61–62.
80. Id.
Goeckels' property "for ingress and egress to Lake Huron." Like many visitors to the Great Lakes, Glass and the Goeckels had walked along the shore in front of their neighbors' private beachfront property. In August 2000, the Goeckels disputed Glass's use of the easement. Glass filed suit in May 2001 to enjoin the Goeckels from interfering with her use of it. The parties resolved the easement issue among themselves in July 2001, and Glass was able to use the easement to pass to and from the lake and to enjoy the beach portion of the easement for "sunbathing and lounging."

One issue remained, however: whether Glass had a right to walk along the beach in front of the Goeckels' property, outside the bounds of her fifteen-foot-wide easement. On May 13, 2004, the trial court granted summary disposition in favor of Glass. Relying on section 2 of the Great Lakes Submerged Lands Act, the court found that she had the right to "use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel."

The Michigan Court of Appeals reversed the trial court on May 13, 2004. It found the Submerged Lands Act inapplicable and held unanimously that Glass could not "interfere" with the Goeckels' right to exclude others from their land. The appellate court reasoned that under the public trust doctrine, the public could use the waters and submerged lands of the Great Lakes up to the water's edge, and the littoral property owner's right of exclusive use extended down to the water's edge. Consequently, it ruled that Glass had no right to walk along the beach between the "ordinary high-water mark" and the water's edge. Thus, according to the court of appeals, visitors to the Great Lakes in Michigan could avoid trespassing on private beaches only by walking

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81. Id.
82. Brief for Appellant at 3, Glass, 703 N.W.2d 58 (No. 126409).
83. Id.
84. Id. at 31–32.
85. Id.
86. Id.
87. Id. at 31–32.
90. Id. at 719, 729.
91. Id. at 729.
92. As for the meaning of the term "littoral," the Michigan Supreme Court noted: Modern usage distinguishes between "littoral" and "riparian," with the former applying to seas and their coasts and the latter applying to rivers and streams. Our case law has not always precisely distinguished between the two terms. Consistent with our recognition that the common law of the sea applies to our Great Lakes, we will describe defendants' property as littoral property.
Glass, 703 N.W.2d at 61 n.1 (internal citations omitted).
93. Glass, 683 N.W.2d at 725–27.
94. Id. at 720–21.
with their feet in the water. Approximately 70% of the 3288 miles of Michigan's shoreline is privately owned.\textsuperscript{95}

Glass appealed to the Michigan Supreme Court, which decided in her favor on June 29, 2005.\textsuperscript{96} The majority agreed with the lower court that members of the public, like Glass, have a right to walk on privately owned Great Lakes beaches within the area of public trust.\textsuperscript{97} The court divided, however, over the location of the landward edge of the area of public trust and the right of the public to walk in that area.\textsuperscript{98} Under the majority's view, the zone of the public trust doctrine in Michigan has always extended from the water up to "the ordinary high water mark," and the state, as sovereign protects the public's right to walk in that area.\textsuperscript{99} Because no Michigan statute, including the Great Lakes Submerged Lands Act, addresses the issue, the court turned to the common law.\textsuperscript{100} The majority held that the Goeckels' property was conveyed to them "subject to specific public trust rights in Lake Huron and its shores up to the ordinary high water mark." In the dissent's view, on the other hand, the line between wet and dry sand defined the boundary down to which littoral landowners could exclude members of the public.\textsuperscript{101} Furthermore, the dissent did not believe that public trust doctrine in Michigan protected the public's right to walk along otherwise private Great Lakes beaches.\textsuperscript{102} The dissenters also disputed the majority's application of the jus privatum and the jus publicum.\textsuperscript{103}

On September 14, 2005, the Michigan Supreme Court denied the Goeckels' motion for a rehearing.\textsuperscript{104} A minor point in the Goeckels' petition was the claim that the court's decision had constituted a taking by transforming private property into public property without compensation.\textsuperscript{105}

On December 12, 2005, the Goeckels petitioned the United States Supreme Court for a writ of certiorari.\textsuperscript{106} The Court denied the petition two months later.\textsuperscript{107} In so doing, the Court has allowed the State of Michigan, through its judiciary, to effect, unconstitutionally, a permanent

\begin{thebibliography}{10}
\bibitem{Eggert} Eggert, \textit{supra} note 2.
\bibitem{Glass} Glass, 703 N.W.2d at 62.
\bibitem{Id.} Id.
\bibitem{Id.} Id. at 61.
\bibitem{Id.} Id. at 62.
\bibitem{Id.} Id. at 62, 73.
\bibitem{Id.} Id. at 61-62.
\bibitem{Id.} Id. at 62.
\bibitem{Id.} Id. at 69 & n.6 (Young, J., concurring in part, dissenting in part).
\bibitem{Id.} Id. at 83 (Markman, J., concurring in part, dissenting in part).
\bibitem{Id.} Id. at 103-06.
\bibitem{Defendants'/Appellees' Motion for Rehearing} Defendants'/Appellees' Motion for Rehearing at 3, 20-23, Glass, 703 N.W.2d 58 (No. 126409).
\bibitem{Glass} Glass, 126 S. Ct. 1340.
\end{thebibliography}
and uncompensated taking of private property for public use.

The Supreme Court did not list its reasons for denying certiorari, as usual, but several possibilities present themselves. First, the Court may have simply agreed with Glass that the Goeckels had failed to properly raise their Fifth Amendment takings challenge in the Michigan state court proceedings. The Goeckels countered this argument by filing a supplemental brief in reply to respond to the supposed lack of federal question. The Goeckels argued that they could not have raised a takings claim at the appellate level, as the issue was not before the court and did not arise until the Court of Appeals issued its decision. They also argued that they had, in fact, raised a potential takings claim in their brief to the Michigan Supreme Court and in their petition for rehearing. Moreover, the Goeckels noted that the Court had found federal jurisdiction in other cases where takings claims had not been raised in the state courts below. If the Court's denial of certiorari turned on the failure to raise federal claims in the Michigan courts, the Goeckels' reply brief may have come too late. The Court denied certiorari four business days after the reply brief was filed.

B. THE NOVEL DEFINITION OF THE BOUNDARY OF THE PUBLIC TRUST IN GLASS IS CONTRARY TO MICHIGAN PRECEDENT AND THE REASONABLE EXPECTATIONS OF PROPERTY OWNERS

The lakeside boundary of the Goeckels' property is described in their deed as the "meander line." In Michigan, the meander line has played a repeated role in disputes over property rights at the water's edge. When surveyors laid out the United States rectangular survey in the nineteenth century, they used the meander line to denote the approximate boundary between land and water. The meander line was used merely to calculate acreage when the government sold the surveyed plots; in contrast, the boundary of private title was defined as the water's

109. See Respondents' Brief in Opposition at 23–26, Glass, 126 S. Ct. 1340 (No. 05-764).
110. Petitioners' Brief in Reply at 3–5, Glass, 126 S. Ct. 1340 (No. 05-764).
111. Id. at 8.
112. Id. at 3–5.
113. Id. at 6–7; see, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 313–14 n.8 (1987); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 85–86 n.9 (1980) ("[F]ederal claims ... have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation.").
117. Id. at 66.
edge. The United States rectangular survey reached Michigan in 1815, but by the 1920s, after a century of reliction and accretion along Lake Huron, the meander line could be hundreds of feet inland from the water's edge. This gap between the meander line and the water's edge would give rise in the 1920s to a period of muddied property law in Michigan.

Michigan early on recognized that the water's edge marked the limit of state, or public, ownership of littoral lands. With regard to the parts of the Great Lakes that lie within Michigan, "the proprietor of the adjacent shore has no property whatever in the land covered by the water," which implies that whatever title the state holds, it ends at the water's edge. Subsequent rulings also recognized the water's edge as the limit of state title.

It must be taken as settled state law that all land submerged, when the water in the lakes stands at low-water mark, is a part of the lake, and the title in the State, and all land between low-water mark and the meander line belongs to the abutting proprietor.

The Supreme Court noted that littoral fee ownership in Michigan is burdened by the federal navigation servitude. And under the public trust doctrine, the state reserves certain rights over private littoral land so that members of the public may hunt, fish, swim, and boat in the waters along the shores of the Great Lakes.

Except for a tumultuous time in the 1920s, the water's edge served as the littoral property line in Michigan. The tumult in the 1920s was caused by the Michigan Supreme Court's decisions in the Kavanaugh cases, which overturned eighty years of case law by holding that the title of littoral landowners extended only to the meander line, not the water's edge, as had previously been thought. The court even conceded that its rulings were "against the overwhelming weight of authority." The Kavanaugh cases involved a dispute about whether title to relicted or accreted land in Saginaw Bay vested in the adjacent landowner or in the

118. Id. at 72, 80; see also Hilt v. Weber, 233 N.W. 159, 161 (Mich. 1930).
119. Steinberg, supra note 116, at 69.
120. Glass, 703 N.W.2d at 80–81 (quoting La Plaisance Bay Harbor Co. v. Council of City of Monroe, Walker's Ch. Rep. 155, 168 (Mich. 1843)).
121. State v. Lake St. Clair Fishing & Shooting Club, 87 N.W. 117, 122 (Mich. 1901) (Hooker, J., concurring) (emphasis added); see also Staub v. Tripp, 235 N.W. 844, 844 (Mich. 1931) ("[P]rivate title extended beyond the meander line to the water's edge.").
123. Glass, 703 N.W.2d at 64–65.
124. Steinberg, supra note 116, at 72, 80.
state. The Kavanaugh cases converted thousands of acres of dry land between the meander line and the lakeshore to state property, and it understandably caused great resentment among littoral landowners and the nascent real estate and tourism industries.

In 1930, in *Hilt v. Weber*, however, the court returned to its earlier precedents and restored the boundary of private title to the water's edge: "the title of the riparian owner follows the shore line under what has been graphically called 'a movable freehold.'" *Hilt* also involved a dispute about the boundary of the state's interests in lakeshore land. Despite the *Glass* court's mischaracterization of *Hilt* as involving the boundary of a littoral landowner's private title, not the public trust, the *Hilt* court explicitly held that the boundary of public trust, not private title, was at issue. *Hilt* eliminated the "overhanging threat of the State's claim of right to occupy [the land between the meander line and the water's edge] for State purposes." The *Hilt* court further held that "[t]he riparian owner has the exclusive use of the bank and shore." In the leading Michigan case on this issue before *Glass*, the court reaffirmed the rule that littoral title extends to the shore: the riparian owner has the right of "exclusive use of the bank and shore."

Just as in *Hilt*, what was at issue in *Glass* was not the lakeside boundary of the Goeckels' private title, but the boundary of the public trust zone. The majority turned to Wisconsin law for the definition of the ordinary high-water mark because it believed that Michigan law lacked a precise definition. In the imported definition, the ordinary high-water mark is "'the point on the ... shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion [or] destruction of terrestrial vegetation.'" In formulating this fresh definition, the majority rejected seventy years of precedent that had developed since *Hilt*.

The dissenters rejected the Wisconsin definition as novel, vague, and

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127. See *Glass*, 703 N.W.2d at 84.
130. See *id.* at 167.
131. See *Glass*, 703 N.W.2d. at 70–71.
133. *Id.* at 168; accord Defendant's/Appellee's Motion for Rehearing at 5–6, *Glass*, 703 N.W.2d 58 (Mich. 2005) (No. 126409).
134. *Hilt*, 233 N.W. at 168 (emphasis added).
136. See *Glass*, 703 N.W.2d at 63 n.5.
137. *Id.* at 62 n.4.
138. *Id.* at 72 (quoting Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914) (defining Wisconsin's public trust doctrine as applied to an inland river)).
unwieldy. After examining traditional Michigan law, they concluded that the water’s edge and the area of sand dampened by the water formed the boundary of the public trust. For the dissenters, the Goeckels’ zone of exclusive use extended from the uplands down to the submerged lands—that is, down to land covered by water and the wet sand next to the water’s edge. The two dissenters conceded that the public had the right to walk on some portion of the beach; they disagreed with the majority, however, on the how far up the beach away from the water that area extended.

In addition to the common law, the majority turned to the Roman law principles of jus privatum and the jus publicum to justify its ruling. The dissenters also challenged the majority’s interpretation of Roman law. The entire court agreed that title to submerged lands under navigable waters is divided between the overlapping jus privatum and the jus publicum, the former protecting the rights of the private owner, but subject always to the latter’s protection of public navigation rights. Contrary to the majority’s application of the jus publicum to unsubmerged lands, the principal dissent argued that under Michigan precedent, the jus publicum has in fact always been limited to submerged lands and the water flowing over them. The dissent observed, moreover, that the jus publicum protects the public’s rights to only certain uses of private property: navigation, fishing, and hunting, not beach-walking.

When it adopted Wisconsin’s use of the “ordinary high-water mark” as the boundary of the public trust zone, the Michigan Supreme Court ignored its own precedent and radically changed the Michigan law governing the rights of the state’s littoral landowners and upset the expectations of Michigan beachfront property owners. In 1978, in response to queries from a state senator, the Michigan Attorney General issued an official opinion stating that:

The owner of riparian property on the shore of one of the Great Lakes

139. See id. at 81–82 (Markman, J., concurring in part, dissenting in part).
140. Id. at 83–85.
141. Id.
142. Id. at 79–80 (Young, J., concurring in part, dissenting in part); see also id. at 90–91 (Markman, J., concurring in part, dissenting in part).
143. Id. at 63–67.
144. Id. at 103–05.
145. Id. at 103.
146. Glass, 703 N.W.2d at 83; see also Nedtweg v. Wallace, 208 N.W. 51, 53 (Mich. 1926) (stating that the State of Michigan retains both the jus privatum and the jus publicum in the submerged lands of the Great Lakes); McMorran Milling Co. v. C.H. Little Co., 167 N.W. 990, 993 (Mich. 1918) (holding that private riparian title (jus privatum) is always subject to the jus publicum); Lorman v. Benson, 8 Mich. 18, 30 (1860) (explaining the use of jus publicum and jus privatum with regard to ownership of a riverbed).
147. See Glass, 703 N.W.2d at 87, 104–05 (Markman, J., concurring in part, dissenting in part).
has the right of exclusive use of the bank and shore[,] although title is in the State. Thus, the riparian owner may prevent persons from using the beach of his riparian land regardless of whether that land is above or below the ordinary high water mark."

The Opinion even suggests that beachfront landowners have the right to bring trespass actions against interlopers. About twenty years later, Michigan's Department of Natural Resources advised the state's citizens that along the shores of the Great Lakes,

"[t]he boundary line is the ordinary high water mark. The riparian owner controls the exposed soil between the ordinary high water mark and the water's edge and may, therefore, prevent the public from trespassing on this exposed soil if he so chooses. The public does, however, have a right of passage in any area adjacent to riparian land covered by water."  

Given the weight of precedent and official pronouncements like these, the Goeckels and other owners of land along Lake Huron could have reasonably expected that one of the sticks in their private property bundle included the right to exclude and expel anyone walking across their beach, just as they have the right to exclude anyone from walking across their land along its roadside boundary. In abolishing the Goeckels' right to exclude trespassers, the Michigan Supreme Court has put private land to public use.

III. **Glass Implicates the Takings Clause of the Fifth Amendment**

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, provides that private property shall not 'be taken for public use, without just compensation.'" The Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." The clause bars the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

*Glass* presents a takings question because (1) private property was (2) taken (3) for public use (4) without payment of just compensation. Because *Glass* involves the public's right to walk along the shore of Lake

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149. See id.


Huron, the court’s ruling unquestionably implicates the “public use” aspect of a taking. And since the Glass court saw no need to offer payment to the affected landowners, the compensation element of a takings claim is satisfied. The dispute lies in whether the sudden and unexpected change in Michigan law in Glass works to take private property. As explained below, Glass effectively takes one of the Goeckels’ private property rights—the right to exclude—and gives it to the State of Michigan for the benefit of the public. This authorization of a permanent, uncompensated, physical occupation of private property for public use thus constitutes a taking of the Goeckels’ property under the Fifth Amendment. Michigan has engaged in a landgrab.

The result in Glass constitutes a taking in two ways. First, “where government requires an owner to suffer permanent physical invasion of her property—however minor—it must provide just compensation.” The Michigan Supreme Court in essence has demanded that littoral landowners grant an easement for public access. Had the Michigan government “simply appropriated the easement in question, this would have been a per se physical taking [requiring compensation].” Second, the decision in Glass also satisfies the multi-factor takings test the United States Supreme Court set forth in Penn Central Transportation Co. v. City of New York. Among those factors are the character of the government action, its economic impact on the property owner, and the historical context.

“The individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.” In Michigan, “state law became paramount on the title [to lakefront property] after it vested in a private person.” A state’s power to define its property law is not, of course, without limits. The Supreme Court has held that “a [s]tate, by ipse dixit, may not transform private property into public property without compensation.” The Court will review a state’s changes to its property law to ensure that constitutional protections are not violated. “To the extent that the decision” of a state supreme court on a property law issue “arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of

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155. Lingle, 544 U.S. at 546.
157. See id. at 124.
the relevant precedents, no such deference would be appropriate. Whether such a decision "worked an unpredictable change in state law thus inevitably presents a federal question for the determination" of the United States Supreme Court. The fact that the Michigan Supreme Court did not give much consideration to the constitutionality of its decision in Glass is no bar to the Supreme Court's consideration of the takings issue here. Because the Michigan Supreme Court has made an unreasonable, sudden, and unpredictable change in Michigan property law, the Supreme Court should not have granted the Michigan decision any deference in considering whether an uncompensated taking had occurred.

A. A Judicial Decision Can Effect a Taking

In Hughes v. Washington, Justice Stewart argued that a state "cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." Justice Scalia has argued more recently in Stevens v. City of Cannon Beach that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation."

The question common to Glass, Hughes, and Stevens is whether a decision of a state supreme court can amount to a taking if the decision changes the state's property law precedents and divests waterside landowners of their property. The Michigan Supreme Court, in Glass, blithely asserted that its decision did not amount to a taking. The Goeckels "have not lost any property rights" under the theory of the majority, because "no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine." However, as explained above, by ignoring its own precedent and shifting the boundary of the area of public trust from the water's edge to the ordinary high-water mark, the Goeckels did, in fact,

162. Id. at 297.
163. Id. at 296-97.
164. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1207 (1994) (Scalia, J., dissenting) (dissenting from the Court's denial of a petition for certiorari to the Oregon Supreme Court for a takings claim brought by beachfront property owners who were not allowed to build a seawall). Glass is distinguishable from both Hughes and Stevens because the rights the Michigan Supreme Court recognized are within the common law public trust doctrine. See Glass, 703 N.W.2d at 673-74. In contrast, Hughes concerned title to land relitigated by the Pacific Ocean, see Hughes, 389 U.S. at 290-91, and Stevens concerned Oregon's application of the English doctrine of custom to prohibit construction on a beach, see Stevens, 510 U.S. at 1207-09.
165. See Glass, 703 N.W.2d at 78.
166. Id.
lose their right to exclude members of the public from what had been the private portion of their beach. The court's decision thus divested them of some of their property—the right to exclude—without affording them just compensation.

Some commentators have agreed with the position taken by Justice Scalia in *Stevens* and have argued that the Fifth Amendment's prohibition on takings ought to be applied to judicial decisions, as well as to legislative and administrative actions.\(^6\) The Court has not historically been willing to review state court decisions as takings, perhaps for prudential reasons and principles of federalism.\(^6\) To be sure, the Court has not been hesitant to tackle takings claims that result from state legislation affecting property rights;\(^6\) however, the Court may have denied the Goeckels' petition for writ of certiorari in part to avoid having to evaluate whether a judicial decision had effected a taking.

As Professor Thompson has noted, the doctrine of judicial takings has been opposed because it would encroach on a domain traditionally reserved to the states: "By extending the takings protections to the courts, federal courts would be controlling the rate and nature of change in state property law—and thus to an extent federalizing that law."\(^7\) Nonetheless, a judicial decision like this, which turns private property into public property, effects a taking just as much as a legislative action would. Since the Supreme Court reviews the decisions of state courts when they have the effect of denying constitutional protections to citizens, the Court should have applied the same scrutiny to the deleterious effects of the judicial taking in *Glass*.

B. **Glass is an Unconstitutional Per Se Taking Because It Grants a Permanent, Uncompensated, Nonconsensual Easement of Public Access Across Privately Owned Littoral Land**

"The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."\(^7\) In *Loretto v. Teleprompter Manhattan CATV Corp.*, a New York state law required

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170. Thompson, supra note 167, at 1509.

landlords to permit cable television companies to install cables and fixtures on their apartment buildings. The landlords were not allowed to interfere with the installation of the cable fixtures or to demand payment beyond the one-time one-dollar payment authorized by the State Commission on Cable Television. The cable equipment on Loretto's building took up very little space, but the Court held that any government-ordered "permanent physical occupation" was a per se taking, even though the law served a public purpose.

The Loretto Court rested its decision on two particular considerations: the physical occupation (1) was without the property owner's consent and (2) was a "permanent occupation." First, the Court dismissed the suggestion that Loretto had consented to the cable installation (and the occupation of her property) because she had bought the building when the cables were already installed and because she chose to remain a residential landlord. The ability to engage in a business cannot be conditioned on forfeiting a right to compensation for a physical occupation. Second, the Court reasoned that a permanent physical occupation denies the owner any power to control use of the property herself, denies her any power to exclude others from that area, and may impair her ability to sell the property. The owner suffers a special kind of injury when the occupier of her property is a stranger, and the injury is made worse because it is not a temporary physical invasion, like that in PruneYard. The Loretto Court also held that the protections of the Fifth Amendment do not depend on the size of the area permanently occupied.

As the United States Supreme Court noted in Nollan v. California Coastal Commission, if the government simply requires landowners to "make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach," this would be without doubt a taking. When such an easement gives the public "a permanent and continuous right to pass to and fro," a "permanent physical occupation" has occurred. The easements for

172. Loretto, 458 U.S. at 421.
173. Id. at 423-24.
174. Id. at 426.
175. Id. at 426-436.
176. Id. at 421-22, 439 n.17.
177. Id. at 439 n.17.
178. See id. at 435-36.
179. Id. at 436; see PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82-83 (1980) (denying a takings claim where a state constitution required shopping center owner to permit individuals to exercise periodically their free speech rights in the shopping center).
182. Nollan, 483 U.S. at 832.
public access in both Nollan and Dolan arose in the context of land-use regulations; a government agency required the easements as a condition of granting development permits.\(^{183}\)

Glass meets the requirements of a per se taking under Loretto. The Goeckels do not consent, of course, to opening the beach in front of their home up to the nebulously defined ordinary high-water mark so that any and all strangers may pass by. Unlike the PruneYard Court, the Michigan Supreme Court does not seem to have contemplated allowing the Goeckels to impose reasonable limitations on the ability of strangers to walk across their land.\(^{184}\) The only way the Goeckels could evade this burden is to sell their property, but like Ms. Loretto, the next owners would also be burdened with the same servitude, whether they consented to it or not. The Glass decision does not allow strangers to install something on the Goeckels’ property, as in Loretto, but it prevents the Goeckels from excluding strangers from part of their once-private beach. Though the issue of exactions is not present in Glass, the easements in Nollan and Dolan and the Glass decision result in the same effect: beachfront landowners are required by the state to dedicate, without compensation, a portion of their property for public use.\(^{185}\)

The Court in Glass requires the Goeckels to grant a permanent easement for public access across their beach without compensation, and without even a nominal quid pro quo like that offered in Nollan and Dolan. The Goeckels have thus suffered a taking, and Michigan ought to have been required to compensate them for it.

C. **Glass Is Also an Unconstitutional Taking Under the Multi-Factor Penn Central Analysis**

In addition to meeting the per se takings test under Loretto, Glass also meets the multi-factor takings test of Penn Central Transportation Co. v. City of New York.\(^{186}\) In Penn Central the Court denied Penn Central Transportation Company’s takings challenge to a New York City landmarks preservation law that had been used to prevent the railroad from redeveloping its property at Grand Central Terminal.\(^{187}\) The railroad had planned either to raze Grand Central Terminal and build a fifty-five-story skyscraper in its stead, or to graft the skyscraper atop the shell of the station.\(^{188}\) The Court noted that “government actions that

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184. See PruneYard, 447 U.S. at 83.
185. Because Glass does not involve exactions, the “essential nexus” and “rough proportionality” requirements of Nollan and Dolan do not apply here. See Dolan, 512 U.S. at 388-91; Nollan, 483 U.S. at 837.
187. Id. at 117, 138.
188. Id. at 116-17.
may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute ‘takings.’”189 In evaluating this type of takings claim, the Court identified several factors of “particular significance.”190 Most relevant here are (1) the character of the government action; and (2) the related factors of (a) its economic impact on the property owner, (b) the degree to which the action interferes with “investment-backed expectations,” and (c) diminution in value resulting from the action.191 The historical context of the *Penn Central* decision is a further factor, though it is present mostly as subtext.

1. **Character of the Government Action in Glass**

“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by the government” than when the interference is in the nature of a nuisance regulation.192 The Supreme Court denied Penn Central's taking claim in part because the landmarks law at issue there did not invade the railroad's property or conscript it for government use, but was rather a restriction on its use, akin to a zoning regulation.193 The Court reasoned, “This is no more an appropriation of property by government for its own uses than is a zoning law . . . or a safety regulation.”194 The Court distinguished the landmarks law from the taking in *United States v. Causby*, which involved a government invasion and appropriation of airspace.195 In *Causby*, low-flying military aircraft destroyed the use of the farm beneath; the Court held that the government had not “merely destroyed property [but was] using a part of it.”196 In contrast, the city’s refusal in *Penn Central* to allow a skyscraper did not destroy the use or value of Grand Central Terminal because, even with the restriction in place, it remained a busy train station.197 The Court also rejected the railroad's contention that its air rights should be severed from the parcel as a whole when the Court analyzed whether the city had taken one of the railroad's property interests.198 In evaluating whether a government action constitutes a taking, the Court “focuses . . . both on the character of the action and the nature and extent of the interference with rights as a whole.”199

In contrast to *Penn Central*, *Glass* offers a textbook example of “an

189. *Id.* at 128.
190. *Id.* at 124.
191. *Id.*
192. *Id.*
193. *Id.* at 135.
194. *Id.*
195. *Id.*; see *United States v. Causby*, 328 U.S. 256 (1946).
198. *Id.* at 130.
199. *Id.* at 130–31.
appropriation of property by government for its own uses." As explained above, when the Michigan Supreme Court moved the boundary of the zone of public trust from the water's edge to the ordinary high-water mark and allowed the public to walk on what had been private land, it conscripted the Goeckels' property for public use. This is not a mere restriction on the Goeckels' development rights as in Penn Central or a public health regulation as in Hadacheck v. Sebastian, but a government-authorized invasion of their property, as in Causby. Michigan has appropriated both the Goeckels' right to exclude and their right to privacy, and it has thereby diminished the value of their parcel as a whole.

2. Economic Impact on the Goeckels and Diminution in Value

In addition to the character of the government action, Penn Central identified economic factors to be used when evaluating a takings claim, i.e., "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." The Penn Central Court found that despite the landmarks law, the railroad could still earn a reasonable return on its investment, especially in light of the fact that the railroad owned numerous properties in the neighborhood that benefited from the presence of the station. The Court also rejected the proposition that "diminution in property value, standing alone, [could] establish a 'taking.'" Diminution in value nonetheless has remained an important factor in the Court's evaluation of takings claims. The Court in Penn Central found that the economic impact of the landmarks law on the railroad was not sufficient to establish a takings claim, especially in light of mitigating factor of the transferable development rights. The law did not prohibit all development above Grand Central Terminal, and the railroad could transfer or sell its unused air space development rights to other parcels.

Because Glass was decided on the basis of a motion for summary dismissal, a full range of evidence on the economic effects of the decision are not present. However, the Michigan Supreme Court's decision to
turn a private beach into a semi-public one will no doubt substantially diminish the fair market value of the Goeckels' property. Though the Goeckels do not hold the land as an investment, its purchase price would have reflected the fact that they were buying 135 feet of private beach along Lake Huron. The premium they paid for privacy has been taken from them by Glass. Moreover, unlike Penn Central, there are no mitigating development rights the Goeckels can use to offset the diminution in value caused by the government action.

3. **Historical Context**

Although the Court in Penn Central does not explicitly refer to the recent history of the railroad in its decision, the backdrop to the action was the 1963 destruction of the magnificent Pennsylvania Station. In the early 1960s, Pennsylvania Railroad decided that its property under Pennsylvania Station would be more valuable if the station were destroyed and replaced with a modern sports, entertainment, and office building complex. Despite much outcry, the railroad tore down Pennsylvania Station, replaced it with a charmless below-ground station, and erected Madison Square Gardens and two office buildings above it. The 1965 New York City landmarks preservation law at issue in Penn Central was a direct result of the railroad's destruction of Pennsylvania Station. The city designated Grand Central Terminal as a landmark only four years later, in 1967. Penn Central opposed the designation but did not then appeal the decision. A year later, still facing financial ruin, Pennsylvania Railroad merged with New York Central Railroad to become Penn Central Railroad. The new railroad company applied for permission in 1968 to build a fifty-five story office tower atop Grand Central Terminal. One of the proposed plans for the skyscraper would
have destroyed a portion of the interior concourse, the other would also have destroyed the terminal’s façade. The Court may have rejected Penn Central’s taking claim in part because it concluded the railroad could not have had any reasonable expectation, investment-backed or otherwise, that it would be allowed to tear down Grand Central Terminal in light of the furor that had accompanied its demolition of Pennsylvania Station only five years earlier. Then-Congressman Edward Koch, the American Institute of Architects, the President of the City Council, and others all testified at hearings against the tower. After the New York City Landmarks Preservation Commission rejected Penn Central’s proposals, the railroad litigated its Fifth Amendment takings claim that led the case to the United States Supreme Court. Given the railroad’s recent history, it is not beyond question that the railroad’s takings claim was little more than an attempt to extort money from the city.

The historical context of Glass could be a factor in the Michigan Supreme Court’s insistence that its decision was not a taking. Glass was a seventy-year-old widow who had owned her property across the highway from the Goeckels for almost forty years. Her brief paints an appealing picture of her use of the picturesque, sandy shores of Lake Huron: “Over the years since 1967, [Glass], her children, and her grandchildren have at times used the beach portion of the easement for sunbathing and lounging, and have always used the easement to access the shore of Lake Huron to walk the beach.” In contrast, the Goeckels are newcomers, having bought the land less than ten years ago. Richard Goeckel soon began to interfere with Glass’s use of the easement by harassing her and her family as they passed through his property. Notwithstanding his counterclaim for trespass against Glass, Goeckel testified in a deposition that he and others habitually walked along the beach on dry sand above the line of wet sand, on his and others’ property, and that others customarily did the same. The defendant’s briefs focused on legal issues and did not strongly rebut this not-very-sympathetic characterization of Richard Goeckel as a man who would harass an elderly widow as she wends her way to the western shore of Lake

219. For descriptions of the outcry at the destruction of Pennsylvania Station, see generally Lorraine B. Diehl, The Late Great Pennsylvania Station (1985). See also Jacqueline Kennedy Onassis, foreword to Grand Central Terminal: City within the City, supra note 215, at 8–9.
221. Id.
223. Id.
224. Id. at 1–2.
225. Id. at 3.
Huron. Just as it did in *Penn Central*, the historical context may have played a quiet role in helping the Michigan Supreme Court decide that its judgment did not amount to a taking. In contrast to *Penn Central*, however, the government action in *Glass* effected a taking of private property for public use without just compensation.

**CONCLUSION**

This Note has argued that the Michigan Supreme Court’s recent decision in *Glass* changed the boundary of all Michigan private beachfront property on the shores of the Great Lakes. By using the public trust doctrine as a tool to redefine the landward edge of the public trust area, the court has permitted members of the public to walk on thousands of miles of private beaches up to the ordinary high-water mark and thereby thwarted the reasonable expectations of landowners. This decision overturned sub silentio decades of Michigan common law, and it illustrates one of the untoward and unconstitutional effects of the application of the public trust doctrine.

What is at stake here is the effect of the Michigan Supreme Court’s conversion of thousands of acres of private littoral land to state property under the guise of public use rights. Given the lack of compensation (and clarity) in the court’s decision, the Michigan real estate and tourism industries are likely to be disrupted, just as they were ninety years ago during the era of the *Kavanaugh* cases. The taking will only grow as the waters in Lakes Michigan and Huron continue to recede. *Glass* will convert more and more relitigated acreage from exclusively private to public ownership, without compensation, though probably not without conflict and litigation. Indeed, some in Michigan are worried that the public might misconstrue *Glass* and believe that it allows them to sunbathe on any Michigan beach.

By allowing the decision in *Glass* to stand, the Supreme Court has authorized states to continue the abuse of the public trust doctrine and achieve an end-run around takings protections. If a state court can simply declare that its decision does not amount to a taking because there was really no private property to be taken, states will be given an incentive to use their courts to circumvent the Fifth Amendment and seize private property without facing the burden (and the constitutional mandate) of paying for it. As *Glass* arguably violates the Fifth Amendment’s prohibition on the taking of private property for public use without just

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227. Hugh McDairmid Jr., *Riverbed Gouging Takes Great Lakes Down a Foot*, DETROIT FREE PRESS, Jan. 25, 2005 (explaining that “Lake Michigan and Lake Huron have permanently lost a foot of water” because of erosion in the river that drains them, and that “the decline will continue for the foreseeable future”); see also Hupp, supra note 2, at 42.
compensation, the Michigan Supreme Court and the United States Supreme Court both erred by not requiring Michigan to compensate the Goeckels for conscripting their property for public use. "Once a court determines that a taking has occurred, the government retains [a] whole range of options." It may amend or rescind the action that created the taking, or exercise eminent domain. However, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Because of the United States Supreme Court's denial of the Goeckels' petition for certiorari, the Goeckels alone are forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."